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December 12, 2000

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: In the Matter of Court Remand of Non-Accounting Safeguards Order, CC Docket No. 96-149

Dear Ms. Salas:

On December 11, 2000, we filed Joint Reply Comments of BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and Verizon. We omitted to add BellSouth to the signature page, however. Enclosed please find an original and two copies of the corrected signature page. I have also enclosed a copy of the entire filing for your reference.

If you have any questions, please call me at (202) 326-7900.

Sincerely,

Michael K. Kellogg

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Court Remand of Non-Accounting Safeguards Order	)	**CC Docket No. 96-149**
	)	

JOINT REPLY COMMENTS OF BELLSOUTH, QWEST, SBC, AND VERIZON

BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and Verizon[1] (collectively the "Bell Party Commenters") jointly submit these reply comments in response to the opposing comments filed November 29, 2000, pursuant to the Commission's Public Notice released November 8, 2000.[2]

Although the 1996 Act plainly declares that "the term 'interLATA service' *means telecommunications*" between points in two different LATAs, 47 U.S.C. § 153(21), the FCC interpreted that term in the *Non-Accounting Safeguards Order*[3] to subsume "information

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[1] This filing is made on behalf of the Verizon telephone companies, which are the local exchange carriers affiliated with Verizon Communications Inc., as well as Verizon Internet Services, Inc.

[2] Public Notice, *Comments Requested in Connection With Court Remand of Non-Accounting Safeguards Order*, CC Docket No. 96-149, DA 00-2530 (rel. Nov. 8, 2000).

[3] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996).

services." But under the 1996 Act, as the Commission correctly determined in its 1997 *Universal Service Order*[4] and its 1998 *Report to Congress*,[5] "telecommunications" and "information services" are mutually exclusive categories. "Telecommunications" is limited by definition to the transmission of information without change in form or content. In contrast, an "information service," provided "via telecommunications," necessarily alters the format of the transmitted information. There is no hint in the 1996 Act that Congress expected the categories of telecommunications and information services to be anything other than mutually exclusive. Consequently, as the Commission made clear in its *Report to Congress*, information service providers do not *provide* telecommunications; they *use* telecommunications. And because an "information service" cannot qualify as "telecommunications," neither can it qualify as an "interLATA service."

The definitions of "telecommunications" and "information service" apply to Bell operating companies ("BOCs") and all other information service providers alike. There is no basis in the 1996 Act to treat a BOC's information service differently from that of a non-BOC. Accordingly, to adopt the position of the opposing commenters would subject many (if not all) information service providers to regulation as common carriers because they, too, would be deemed providers rather than users of telecommunications when supplying the necessary, underlying transmission component of their information service. As common carriers, information service providers would also be deemed by statute to be mandatory contributors to

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[4] Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997), *aff'd in part, rev'd and remanded in part, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2212, 2237 (2000), *cert. granted*, 120 S. Ct. 2214 (2000), *cert. dismissed*, 121 S. Ct. 423 (2000).

[5] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998).

universal service.[6] All this regulation, certainly unintended by the Congress that enacted the 1996 Act, would be the result of torturing the statutory language to find a basis, where there is none, to treat a BOC-provided information service as the simultaneous provision of telecommunications.

On the other hand, concluding that for BOC and non-BOC alike the provision of an information service does not involve the provision of telecommunications is faithful to the statutory text and to the Commission's longstanding precedent of mutually exclusive regulation of "basic" and "enhanced" services — the precursors of the current regime of "telecommunications" and "information services" under the 1996 Act. Moreover, it is the only reading that is consistent with the 1996 Act's focus on increasing competition and decreasing regulation.

I. "INTERLATA SERVICES" DO NOT INCLUDE INTERLATA "INFORMATION SERVICES"

Under the 1996 Act, "[t]he term 'telecommunications' means the *transmission*, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received." *Id.* § 153(43) (emphases added). Whereas "telecommunications" denotes transmission with *no* change in form or content, "information services" necessarily *do* involve a change in form or content: "[t]he term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*." *Id.* § 153(20) (emphasis added). Because an information service requires

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[6] Even non-common carriers could well be required to contribute to universal service pursuant to the Commission's precedent established under its permissive authority.

an alteration of the form or content of the transmitted information, it cannot qualify as "telecommunications," and therefore cannot be an "interLATA service."

A. Information Service Providers May Bundle the Underlying Transmission Without Being Deemed Telecommunications Providers

The opposing commenters generally support the conclusion in the *Report to Congress* that information service providers do not provide (but rather use) the underlying telecommunications, yet they incongruously support the Commission's conclusion in the *Non-Accounting Safeguards Order* that when a BOC provides the same information service it also provides (not merely uses) telecommunications, and therefore must be understood to provide "interLATA service." ITAA's Comments at 14-15; WorldCom's Comments at 4-5; CompTel's Comments at 3-4; Focal's Comments at 1-2. AT&T says this follows from the premise that "information services do not 'necessarily' include a bundled telecommunications component," because the underlying transmission may be offered by means independently chosen by the customer. AT&T's Comments at 7. In fact, most information service providers do supply the transport for their information services, such as a voice mail provider that supplies its customers with a toll-free number. Indeed, the Commission recognizes that such "bundling," as AT&T puts it, is the normal way that Internet service providers do business. *See, e.g., Report to Congress* ¶ 73 (explaining that Internet service providers "combine computer processing, information provision, and other computer-mediated offerings with data transport"); *id.* ¶ 80 (explaining that an Internet service provider "offers end users information-service capabilities inextricably intertwined with data transport").

These commenters cannot have it both ways. The relevant terms of the 1996 Act — "telecommunications" and "information services" — apply to BOCs and non-BOCs alike. It is irrelevant that the underlying telecommunications could be offered separately. Under the 1996

Act it need not be, and this is confirmed by the Commission's interpretation in the *Universal Service Order* and the *Report to Congress*, as well as by longstanding Commission precedent, incorporated by the 1996 Act, that was developed under the Commission's regime of basic and enhanced services.

As the Commission correctly reported to Congress, the statutory definitions in the 1996 Act make clear that "an entity is *not* deemed to be providing 'telecommunications,' *notwithstanding its transmission of user information*, in cases in which the entity is altering the form or content of that information." *Report to Congress* ¶ 40 (second emphasis added). In other words,

> when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications. Rather, it offers an "information service" even though it *uses* telecommunications to do so. We believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals.

Id. ¶ 39 (emphasis added).

If a non-BOC information service provider does not provide the underlying telecommunications, then neither does a BOC when providing a similar information service. Contrary to AT&T's baseless assertion, the term "interLATA services" presents no "unique context." AT&T's Comments at 9. Indeed, AT&T itself recognizes as it must that "Congress . . . defined 'interLATA services' as referring *only* to 'interLATA telecommunications': that is, telecommunications across LATA boundaries." *Id.* at 11 (emphasis added).[7]

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[7] Similarly, CompTel agrees that "the terms 'information service' and 'telecommunications service' are mutually exclusive," yet claims that "each is a subset of the broader term 'interLATA services' because each involves a 'telecommunications' component." Comptel's Comments at 3. As explained, those positions are at war with one another and cannot both be true.

B. Congress Did Not Intend for Information Service Providers to be Deemed Telecommunications Providers, Regulated As Common Carriers, or Required to Contribute to Universal Service — Yet That Necessarily Follows From the Opposing Commenters' Position

1. *Common Carriage*

The opposing commenters' position is neither procompetitive nor deregulatory, and therefore at odds with the Act's "'pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.'" *Non-Accounting Safeguards Order* ¶ 1 (quoting Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 1 (1996)). Rather, in a sharp break from precedent, many if not all information service providers would, under the opposing commenters' theory, be "presumptively subject to the broad range of Title II constraints" (*i.e.*, regulated as common carriers) because they would become providers rather than users of telecommunications when they incorporate the necessary transmission component with their information service. *Report to Congress* ¶ 46. Facilities-based providers would also be subject to the interconnection requirements of section 251(a).[8]

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[8] "Each telecommunications carrier has the duty (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256." 47 U.S.C. § 251(a). The Commission has held that "[u]nlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power," and has declined to "forbear from imposing the provisions of section 251(a) on non-dominant carriers." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15991 ¶ 997, *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, No. 96-3321, 2000 U.S. App. LEXIS 17234 (8th Cir. July 18, 2000).

That, however, "could seriously curtail the regulatory freedom that the Commission concluded in *Computer II*[9] was important to the healthy and competitive development of the enhanced-services industry." *Id.* Sixteen years before passage of the 1996 Act the Commission held that enhanced services, which are offered "'*over* common carrier transmission facilities,' were themselves not to be regulated under Title II of the Act, *no matter how extensive their communications components*." *Id.* ¶ 27 (quoting *Computer II Order* ¶ 114) (second emphasis added).[10]

The 1996 Act did not shy away from this deregulatory policy, but rather adopted it: "Congress intended the categories of 'telecommunications service' and 'information service' to be mutually exclusive, like the definitions of 'basic service' and 'enhanced service' developed in our *Computer II* proceeding . . . ." *Id.* ¶ 13; *see also id.* ¶ 58 ("An offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components.").

Thus, "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via

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[9] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d 384 (1980).

[10] The Commission defined a "basic transmission service" as the offering by a common carrier of "pure transmission capability" for the movement of information "over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Order* ¶¶ 93, 96. By contrast, the Commission defined "enhanced service[s]" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a). The common-carrier offering of basic services was regulated under Title II of the 1934 Act, but enhanced services were not. *See Computer II Order* ¶ 114.

telecommunications.'" *Id.* ¶ 21 (quoting 47 U.S.C. § 153(20)). The Commission's "findings in this regard are reinforced by the negative policy consequences of a conclusion that Internet access services should be classed as 'telecommunications'[, which] could have significant consequences for the global development of the Internet." *Id.* ¶ 82. The Internet and other information services have thus far "been able to grow rapidly in part because the Commission concluded that enhanced service providers were not common carriers within the meaning of the Act," *id.* ¶ 95, and the policy of the 1996 Act is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); *see also Report to Congress* ¶ 37 ("'it certainly was not Congress's intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to *extend* the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation'") (quoting Letter to FCC from Senator McCain); *id.* ¶ 38 ("'Rather than expand regulation to new service providers, a critical goal of the 1996 Act was to diminish regulatory burdens as competition grew.'") (quoting Letter to FCC from Senator Ashcroft, *et al.*).

In addition, "classification of information service providers as telecommunications carriers . . . could encourage states to impose common-carrier regulation on such providers." *Id.* ¶ 48. State requirements vary between jurisdictions, but generally include certification, tariff filing, and various reporting requirements and fees. Similarly, a decision by the FCC to classify information service providers as providers of the underlying telecommunications could encourage foreign countries to "subject information service providers to market access restrictions or above-cost accounting rates. Such a result would inhibit growth of these

procompetitive services, to the detriment of consumers in the United States and abroad." *Id.*

2. *Universal Service*

Under the position that AT&T and others advance, many information service providers would necessarily be deemed common carriers and therefore *mandatory* contributors to universal service mechanisms, a result that the Commission has rejected. *See id.* ¶ 115; 47 U.S.C. § 254(d). Even if an information service provider made its offering on a non-common carrier basis, it could still be required to contribute to universal service under the Commission's "permissive" contribution authority. *See Report to Congress* ¶¶ 69, 116; 47 U.S.C. § 254(d). And FCC precedent strongly suggests that the Commission would be compelled under its "principle of competitive neutrality" to exercise its permissive authority in requiring information service providers to contribute to universal service. *Universal Service Order* ¶ 796 (requiring "providers that provide telecommunications to others in addition to serving their internal needs to contribute to federal universal service on the same basis as telecommunications carriers. Without the benefit of access to the PSTN, which is supported by universal service mechanisms, these providers would be unable to sell their services to others for a fee.").

Thus, even aside from the plain language of the statute, the opposing commenters' position cannot be correct, because it would require the Commission to treat many information service providers — including Internet service providers — as common carriers, thereby making them mandatory contributors to universal service and potentially subjecting them to further state and foreign regulation. That would hardly be consistent with the "deregulatory and procompetitive goals" of the 1996 Congress. *Report to Congress* ¶ 47; *see also* Cox's Comments at 4-5. Even AT&T concedes that subjecting information service providers to

common carrier and universal service regulation would be an "absurdity." AT&T's Comments at 2. But that is the necessary result of the opposing commenters' position.

3. *The Opposing Commenters Cannot Show That the 1996 Act Treats BOC Providers of Information Services Differently from All Other Providers of Information Services*

Attempting to escape this dilemma, AT&T wrongly claims that "the entire thrust of the 1998 Report [to Congress] was to determine not whether and when information services can be deemed to offer 'telecommunications,' but to decide whether these services constitute 'telecommunications services,'" *i.e.*, common carrier services.[11] AT&T's Comments at 17; *see also* CompTel's Comments at 7-8; ITAA's Comments at 6-7. It is AT&T, however, that takes this Report "out of context." AT&T's Comments at 17. The reason the Report concluded that information service providers are not providers of "telecommunications services" and therefore not subject to regulation as common carriers is because they "generally do not provide telecommunications" in the first place. *Report to Congress* ¶¶ 15, 55. Thus, the Commission concluded, "an approach in which 'telecommunications' and 'information service' are mutually exclusive categories is most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service." *Id.* ¶ 59.[12] Necessarily implicit in the Commission's reasoning was that, if information service providers were deemed to be providers of

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[11] A "telecommunications service" is the "offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). The Commission has held that this definition is "intended to encompass only telecommunications provided on a common carrier basis." *Universal Service Order* ¶ 785.

[12] *See also, e.g., id.* ¶ 39 ("when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications"); *id.* ¶ 41 ("an entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not 'change . . . the form and content' of the information").

"telecommunications," they would in many cases do so on a common carrier basis, thereby providing "telecommunications services." *See id.* ¶¶ 23-28 (discussing pre-1996 Act regime of basic and enhanced services, which applied only to common carrier offerings); *id.* ¶ 69 (noting that where an Internet service provider engages in data transport over its own transmission facilities, it might be providing telecommunications on either a common or a non-common carrier basis). Nowhere in the *Report to Congress* does the Commission suggest that an information service provider may be a "telecommunications" provider but not a "telecommunications service" provider. AT&T simply fabricates that distinction.

Equally spurious is AT&T's and WorldCom's claim that the Commission's analysis in the *Report to Congress*, and the argument presented in the Verizon/Qwest appellate brief, turns on the meaning of "provide" as used in section 271. AT&T's Comments at 18-20; WorldCom's Comments at 5-6. It does not. Rather, it turns on the definition of "interLATA services." Because the term "'interLATA service' *means telecommunications*" between points in two different LATAs, 47 U.S.C. § 153(21) (emphasis added), the prohibition of section 271(a) applies only when a Bell operating company or its affiliate "provides" "*telecommunications*" between LATAs. No matter how broadly the word "provide" is construed, it cannot change "telecommunications" into an "information service."[13] As the Verizon/Qwest appellate brief and the *Report to Congress* demonstrate, "'telecommunications' and 'information service' are

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[13] The case upon which these commenters rely is entirely inapposite. *U.S. West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 1240 (2000), involved an arrangement whereby two BOCs marketed Qwest's "long distance service"—which is telecommunications—to the BOCs' customers. *Id.* at 1058. No one argued that Qwest's service was anything other than telecommunications, much less an information service. Rather, the issue was whether the BOCs should be deemed under section 271(a) to "provide" that undisputed telecommunications on an interLATA basis (an "interLATA service")

mutually exclusive categories." *Report to Congress* ¶ 59. Information services, though provided "via telecommunications," are *not* "telecommunications." It necessarily follows that information services provided on an interLATA basis are not "interLATA services." Here the opposing commenters mistakenly attack an argument that has no bearing on this case and that, in any event, the Bell Party Commenters never made.

Several commenters wrongly suggest that a 1990 D.C. Circuit holding under the MFJ — that a BOC could not bundle the underlying interLATA transmission with its information service — is somehow controlling under the 1996 Act. AT&T's Comments at 9; WorldCom's Comments at 14-16; Level 3's Comments at 5; CompTel's Comments at 3-4; ITAA's Comments at 3-5. But the 1996 Act *supplanted* the MFJ. Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 143; *AT&T Corp. v. FCC*, Nos. 99-1538 & 99-1540, 2000 WL 964030, at *2 (D.C. Cir. Aug. 1, 2000). As the Commission has recognized, "the 1996 Act built on the Commission's deregulatory actions [pursuant to its longstanding basic/enhanced services regime] in *Computer II*, so that 'telecommunications' and 'information service' are mutually exclusive categories." *Report to Congress* ¶ 69 n.138.[14] Although Congress drew some elements of section 271 from

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via their marketing arrangement with Qwest. *Id.* at 1059 (interpreting the term "provide" by examining the "relation of an actor to such telecommunications").

[14] AT&T's claim that the 1996 Act increased rather than decreased regulation of the BOCs with regard to the scope of the long-distance prohibition is flawed. AT&T notes that the section 271 prohibition extends to all interLATA telecommunications, while the MFJ's similar prohibition extended only to "interexchange telecommunications services." AT&T's Comments at 11. This shows little, if anything, and AT&T fails to explain its significance. Under the MFJ, a "telecommunications service" was the "offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." *United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982). Aside from a few minor internal uses of interexchange telecommunications, it is hard to imagine what telecommunications the BOCs would not have been deemed to offer "for hire." And the Department of Justice took the position that the MFJ's prohibition of "interexchange telecommunications services" was exceedingly broad, and certainly not limited to common carrier services. Brief for the United States, *United States v. Western Elec. Co.*, No.

principles found in the MFJ, the application of section 271 is governed by the 1996 Act's express definitions, not by pre-1996 decisions construing the non-statutory AT&T consent decree. Indeed, the Commission has held that MFJ definitions do not control even where the language of the 1996 Act definitions seems similar.[15] In the Bell Atlantic/GTE Merger Order the Commission declined to adopt the MFJ's "definition of an 'affiliate' that closely parallels section 3(1)'s language. [47 U.S.C. § 153(1)]." Memorandum Opinion and Order, *Application of GTE Corp. and Bell Atlantic Corp For Consent to Transfer Control*, 15 FCC Rcd 14032, ¶ 49 (2000). "The 1996 Act expressly overhauled the MFJ in favor of a pro-competitive and deregulatory regime designed to open all telecommunications markets to competition, and we decline to import into the Act an understanding of the term 'affiliate' derived solely from the MFJ." *Id.* ¶ 50 (footnote omitted).

Moreover, at the time the 1996 Act was passed the MFJ Court had before it a waiver application, filed by the seven BOCs and supported by the Department of Justice, that would have allowed Bell companies to resell interexchange services in connection with their provision of certain information services, including e-mail. *See* Motion of the Bell Companies for a Waiver of the Interexchange Restriction to Permit Them to Provide Information Services Across LATA Boundaries, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. filed April 24,

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89-5034, at 19-20 (D.C. Cir. filed March 23, 1990). If the 1996 Act is broader than the MFJ in this respect, the difference is vanishingly small.

[15] In fact, the 1996 Act differs significantly from the MFJ in its definition of an information service. The MFJ provided that "'[i]nformation service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *which may be conveyed* via telecommunications." *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). The 1996 Act deletes the emphasized language, thus indicating that an "information service" includes the necessary transmission to users "via telecommunications." *Id.* § 153(20). There is thus no basis to rely on the MFJ definitions in this case.

1995). Congress effectively incorporated the premise for this pending waiver request in the 1996 Act when it subjected BOCs and non-BOCs alike to the same "mutually exclusive" regime of telecommunications and information services. Indeed, in the case that the commenters rely on, the D.C. Circuit held that the BOCs in 1990 had presented a "powerful argument for a waiver" of the MFJ's interexchange restriction on the underlying transmission of an information service. *United States v. Western Elec. Co.*, 907 F.2d 160, 165 (D.C. Cir. 1990).

History did not stand still, and that 1990 judicial statement presaged the 1996 Act's equal treatment of all BOC and non-BOC provision of information services. The goal of increasing competition for all telecommunications services animates the entire Act and strongly supports a conclusion that permits BOCs to provide information services in competition with other information service providers, even if doing so entails the use of interLATA telecommunications. After all, the intent of the 1996 Act is "'to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of *advanced telecommunications and information technologies* and services to all Americans by opening all telecommunications markets to competition." *Non-Accounting Safeguards Order* ¶ 1 (quoting Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 1 (1996)) (emphasis added).

Nor is there merit to the commenters' claim that this interpretation would create an "enormous loophole" in the interLATA services restriction. AT&T's Comments at 9; *see also* WorldCom's Comments at 16-17; Level 3's Comments at 2-3; ITAA's Comments at 12-13. As the Commission has recognized, it has ample power to protect against "sham" information services. "It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice

mail." *Report to Congress* ¶ 60. "[T]he issue is whether, functionally, the consumer is receiving two separate and distinct services." *Id.* (quotation omitted).

As explained above, under the express statutory definitions applicable to BOCs and non-BOCs alike, the provision of an information service simply does not constitute the provision of "telecommunications." The Commission may not interpret these express statutory definitions one way for the BOCs and another way for all other information service providers. Either both the BOC and the non-BOC provide the underlying telecommunications when they provide an information service, or neither does, for the definitions of "telecommunications" and "information service" are universally applicable. And as the Commission has convincingly demonstrated in both the *Universal Service Order* and the *Report to Congress*, under the 1996 Act neither can be deemed a provider of telecommunications.

II. THE STRUCTURE OF SECTIONS 271 AND 272 CONFIRM THAT "INTERLATA SERVICES" DO NOT INCLUDE "INFORMATION SERVICES"

A. Separate Affiliate Requirements

As explained in the Verizon/Qwest appellate brief (at 14-15), section 272(a)(2)(C), by its plain terms, requires a separate affiliate when a Bell operating company provides "interLATA information services." That Congress treated "interLATA information services" differently from "interLATA telecommunications services" fortifies the statute's clear distinction between "telecommunications" and "information services." Significantly, whereas section 272(a)(2)(B) includes three separate references to provisions of section 271, section 272(a)(2)(C) makes no reference at all to section 271. And only subparagraph (B) speaks of "origination," a distinction that has special significance under section 271. The strong implication is that "interLATA

telecommunications services" are subject to the prohibition in section 271, but that "interLATA information services" are not.[16]

Moreover, even if the term "interLATA telecommunications services" in section 272(a)(2)(B) is read as a narrower subset of "interLATA services," the statute specifically defines "telecommunications services" separately from "telecommunications." "Telecommunications services" reaches only the provision of "telecommunications *for a fee directly to the public*" (47 U.S.C. § 153(46) (emphasis added)). As the Commission has already explained, the term is limited to "telecommunications provided on a common carrier basis." *See Universal Service Order* ¶ 785; *see also Report to Congress* ¶ 124. As the Verizon/Qwest appellate brief explained, the most that can be inferred from section 272(a)(2)(B) is that "interLATA services" reaches more than *common-carrier* transmission services. Section 272(a)(2)(B) plainly *cannot* be read to imply that the term "interLATA services," contrary to its express definition, reaches more than "telecommunications."

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[16] To the extent BellSouth's Comments filed in this proceeding in 1996 can be interpreted otherwise, *see* AT&T's Comments at 14, BellSouth states that the Commission's subsequent analysis in the *Universal Service Order* and the *Report to Congress* is the correct reading of the relevant provisions of the 1996 Act and compels the conclusion stated in the text here. In any case, BellSouth's earlier position in this proceeding cannot change the law or Congress's intent. As to AT&T's similar claim regarding Bell Atlantic's and U S WEST's comments, *see* AT&T's Comments at 14-15, Verizon and Qwest maintain that those documents dealt with a very different issue decided in the *Non-Accounting Safeguards Order*: whether information services must be provided through a separate affiliate under 47 U.S.C. § 272(a)(2). Indeed, in its motion for remand in this proceeding the Commission itself stressed the distinctness of that issue in explaining its own failure to give full consideration to the scope of "interLATA services" under section 271. Motion of Federal Communications Commission for Remand to Consider Issues at 8, *Bell Atlantic v. FCC*, No. 99-1479 (D.C. Cir. filed Sept. 22, 2000). AT&T inappropriately wrenches Bell Atlantic's and U S WEST's passing statements from their different context, where neither Bell Atlantic nor U S WEST separately re-examined the legal issue that the Commission had already resolved: whether information services are "interLATA services." In any case, none of the comments cited by AT&T post-date the Commission's correct interpretation in both the *Universal Service Order* and the *Report to Congress*.

WorldCom asserts that Congress had no reason to make such a distinction between common and non-common carriage, but that argument in no way refutes the clear statutory language based on expressly defined terms. WorldCom's Comments at 10. And as the Verizon/Qwest appellate brief explains (at 20), when the 1996 Act was passed, long-distance private-line revenues were but a small fraction of total long-distance revenues. Though WorldCom adds that "carriers do provide private line services on a common carrier basis," that simply reinforces the BOCs point that Congress had little reason to require a separate affiliate for non-common carrier telecommunications. WorldCom's Comments at 10; *see also* ITAA's Comments at 10.

AT&T and WorldCom claim that the "interLATA services" referred to in section 271(a) include information services because section 272(a)(2)(B) exempts from the separate affiliate requirement the incidental interLATA services listed in section 271(g)(1), (2), (3), (5), and (6), which in these commenters' view include a number of information services. AT&T's Comments at 12-13; WorldCom's Comments at 10-12. But, as we explain below (*infra* at 20), Congress's enumeration of these incidental services under the heading of "interLATA *telecommunications* services" demonstrates that Congress viewed them as telecommunications services. 47 U.S.C. § 272(a)(2)(B) (emphasis added).[17] Had Congress viewed these incidental services as information services rather than telecommunications, it would instead have placed that exemption in subsection (C), which addresses the separate affiliate requirement for "interLATA information services."

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[17] As WorldCom acknowledges, "section 272(a)(2)(B)'s treatment of 'interLATA telecommunications services' is followed immediately by section 272(a)(2)(C)'s treatment of 'interLATA information services.'" WorldCom's Comments at 11.

Level 3 claims that "[i]f the BOCs were permitted to provide interLATA information services without satisfying the 271 requirements, there would be no reason for Congress to have established the separate affiliate protections in section 272(a)(2)(C)." Level 3's Comments at 2; *see also* ITAA's Comments at 7-8. That argument is a *non sequitur*, for a separate affiliate has often been required for permitted services (and would be nonsensical for prohibited services). Rather than prohibit a BOC from providing information services accompanied by the necessary transmission until it received section 271 relief, Congress may well have considered the separate affiliate a sufficient safeguard.

B. Sunset Provisions

As explained in the Verizon/Qwest appellate brief (at 15), section 272(f), which establishes the sunset dates of the various separate-affiliate requirements, further confirms that section 271 is limited to telecommunications and does not include information services. 47 U.S.C. § 272(f). By tying the sunset of the separate-affiliate requirement for "interLATA telecommunications services" to approval of a Bell operating company's application filed under section 271(d), *id.* § 272(f)(1), while separately tying the separate-affiliate requirement for "interLATA information services" to enactment of the 1996 Act, *id.* § 272(f)(2), Congress underscored its intent that section 271 has no application to "interLATA information services."

AT&T claims that this grouping simply reflects that BOCs were authorized immediately to provide the "incidental interLATA services" in section 271(g)(4) through a separate affiliate and that it has no significance for the interpretation of section 271. AT&T's Comments at 13. AT&T is wrong. By exempting the rest of the incidental services listed in section 271(g) from the separate-affiliate requirement for interLATA telecommunications rather than for interLATA information services, Congress demonstrated that it viewed those services as

telecommunications. 47 U.S.C. § 272(a)(2)(B). Otherwise, it would have exempted them from the separate affiliate requirement for interLATA information services. *Id.* § 272(a)(2)(C).[18]

III. THE "INCIDENTAL INTERLATA SERVICES" PROVISION OF SECTION 271(G) DOES NOT EXPAND THE "INTERLATA SERVICES" PROHIBITION BEYOND ITS DEFINED MEANING

Section 271(b)(3) says that a BOC (or affiliate) may provide "incidental interLATA services (as defined in subsection (g))." 47 U.S.C. § 271(b)(3). Section 271(g) then defines "incidental interLATA services" to mean any of a fixed list of services. *Id.* § 271(g). Some commenters claim that some items on that list are necessarily information services and therefore that "interLATA services" must include interLATA information services. *E.g.*, AT&T's Comments at 11-12; WorldCom's Comments at 7-9; CIX's Comments at 6; ITAA's Comments at 8. But the FCC did not rely on this theory in the *Non-Accounting Safeguards Order*, and for good reason.

Fundamentally, the argument makes nonsense of the express limitations imposed by the definition of interLATA services. To begin with, this type of indirect negative inference (even if it rested on a correct characterization of section 271(g)) could not justify flatly overriding the expressly defined meaning of "interLATA services." The argument is offered not to *support* one among several reasonable interpretations of the language set forth in the definition of "interLATA service." It is offered simply to *contradict* that definition. Surely the definition must control if there is any conflict. *See Meese v. Keene*, 481 U.S. 465, 484-85 (1987) ("It is

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[18] Similarly, WorldCom's and ITAA's observation that the separate-affiliate requirement for information services applies both in-region and out-of-region, while the separate-affiliate requirement for telecommunications applies only in-region, actually supports the view that the section 272 information service obligations are independent of section 271. WorldCom's Comments at 12-14; ITAA's Comments at 10-11. The section 271 prohibition on interLATA services applies only in-region. 47 U.S.C. § 271(a)-(b).

axiomatic that the statutory definition of the term excludes unstated meanings of that term."); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) ("As a rule, '[a] definition which declares what a term "means" . . . excludes any meaning that is not stated.'") (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)), *overruled in part on other grounds*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *cf.* 47 U.S.C. § 153(21) ("The term 'interLATA service' means telecommunications.").

Moreover, the structure of the statute makes plain that Congress viewed the incidental interLATA services listed in section 271(g) as telecommunications, not as information services. As discussed above, in section 272(a)(2)(B), which requires a separate affiliate for the "[o]rigination of interLATA telecommunications services," Congress carved out an exception for the "incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g)." 47 U.S.C. § 272(a)(2)(B)(i). Had Congress viewed these incidental services as information services, it would instead have excepted them, not from the separate-affiliate requirement for interLATA telecommunications services, but from the separate-affiliate requirement for "interLATA information services" found in the next paragraph. *Id.* 272(a)(2)(C).[19]

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[19] The Commission itself has recognized that "[f]or the most part, the incidental interLATA services . . . are telecommunications services." *Non-Accounting Safeguards Order* ¶ 94 (footnote omitted). AT&T claims that the provisions relating to audio and video programming (section 271(g)(1)(A)-(C)) are information services, AT&T's Comments at 12, but those services are generally treated as broadcast or cable services under Title III of the Communications Act, not as "information services." Reinforcing this point, section 271(i)(2) provides that the term "audio programming services" means programming provided by or comparable to that provided by a radio station, and section 271(i)(3) states that "video programming services" has the same meaning as it has under section 522, which defines terms used in Title III of the Act. 47 U.S.C. § 271(i)(2)-(3). *See also* Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 14 FCC Rcd 16299, ¶ 52 & n.199 (1999) (noting that

In addition, it would be especially implausible, as a matter of gauging congressional intent, to rely on a provision that *authorizes* service (section 271(g)) as a justification for

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no commenter had offered "any arguments to support the contention that a video programming service is an information service," finding it unnecessary to resolve the question); *id.* ¶ 48 n.185 (noting commenter's contention that "the transmission of video programming is the transmission of information of the video provider's choosing rather than information of the 'user's choosing,' as the Act's definition of 'telecommunications' requires"). Moreover, audio or video programming services can easily be offered as common-carrier transmission services and thus be deemed to come within the definition of "telecommunications," *i.e.*, transmission without change of user-selected programs from a program originator. *See* 47 U.S.C. § 571(a)(2) ("To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of subchapter II" of the Communications Act). AT&T also claims that section 271(g)(2), which designates as an incidental interLATA service "two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools," is an information service. AT&T's Comments at 12. But the Commission itself has necessarily recognized that this service is sometimes a telecommunications service. *See Non-Accounting Safeguards Order* ¶ 95 (Section 271(g)(2) "may encompass services that are not solely telecommunications services. The statute does not classify educational interactive interLATA services as either telecommunications services or information services") (footnote omitted). Nor are the store-and-retrieve services in section 271(g)(4) necessarily information services. *See* AT&T's Comments at 12. In the 1980s the Commission held that both computer-assisted and operator-assisted directory assistance services are *not* enhanced services but rather "adjuncts to basic services" regulated pursuant to Title II of the Communications Act. Memorandum Opinion and Order, *North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, 101 F.C.C. 2d 349, ¶ 24 (1985) (computer assisted directory assistance) ("*Centrex Order*"); *see also Computer II Order* ¶ 98 (operator-assisted directory assistance). As the Commission explained, "adjuncts to basic services are services which might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly 'basic' in purpose and use and which bring maximum benefits to the public through their incorporation in the network." *Centrex Order* ¶ 24. In view of this pre-1996 Act regulatory treatment, it follows that the section 271(g)(4) services can be telecommunications services. *See Non-Accounting Safeguards Order* ¶ 107 (holding "that services that the Commission has classified as 'adjunct-to-basic' should be classified as telecommunications services, rather than information services"); Memorandum Opinion and Order, *Petition of U S West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, ¶ 61 (1999) (holding that certain directory assistance services subject to section 271(g)(4) are classified as adjuncts to basic services because they "facilitate the use of the basic network and do not materially change the nature of the underlying telephone call").

tightening the *prohibition* in section 271(a) beyond its explicit meaning. *See Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 647 (D.C. Cir. 1951) (refusing to adopt a construction that would "nullify . . . the statutory definition"). Thus, even if some items on the section 271(g) list could apply only to information services and could not even plausibly be thought to constitute telecommunications, the fairest inference would be that Congress included some extra, unnecessary assurance against possible mistakenly expansive interpretations of the section 271(a) prohibition. "[A] belt-and-suspenders approach is not uncommon when the Legislative Branch cedes rulemaking power to the Executive Branch." *O'Connell v. Shalala*, 79 F.3d 170, 180 (1st Cir. 1996).

Congress simply wanted to make clear its intention to permit certain services that otherwise might arguably have been barred as the interLATA provision of telecommunications. As the D.C. Circuit has noted, "[s]ometimes Congress drafts statutory provisions that . . . appear duplicative of others — simply, in Macbeth's words, 'to make assurance double sure.' That is, Congress means to clarify what might be doubtful — that the mentioned item is covered." *Shook v. District of Columbia Fin'l Responsibility and Mgmt. Assist. Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998).

That is exactly what happened here. The action of a later Congress illustrates the problem that the enacting Congress thus recognized and addressed in section 271(g). In a 1998 Appropriations Act that was the precursor to the *Report to Congress*, Congress directed the Commission to review its interpretations of certain defined terms in the 1996 Act for fidelity to "the plain language" of the Act, including "the application of those definitions to mixed or hybrid services." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 623, 111 Stat. 2440, 2521. In

response, the Commission analyzed certain services on their facts to see whether they constituted telecommunications, or information services. *See Report to Congress* ¶¶ 55-93. With respect to one service, IP (or Internet) telephony,[20] the Commission reserved judgment "in the absence of a more complete record focused on individual service offerings." *Id.* ¶ 83. The Commission recognized that the proper classification of the service may depend on the technology used. *Compare id.* (noting that the record before it "suggests that certain 'phone-to-phone IP telephony' services lack the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services'") *with id.* ¶ 87 (observing that with "computer-to-computer IP telephony, the Internet service provider does not appear to be 'provid[ing]' telecommunications to its subscribers") (footnotes omitted).

Congress's later action thus serves to illustrate a problem that the enacting Congress in 1996 had recognized: how would certain real-world "mixed or hybrid services" be classified on their facts — as telecommunications, or as information services? As the Commission noted in its *Report to Congress*, "the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service." *Id.* ¶ 60. Indeed, the Senate Report to the 1996 Act indicates that the Commission would have authority to clarify which services fall within the definition of information services "as technology changes." S. Rep. No. 104-23 at 18 (1995) ("New subsection (pp) defines 'information service' similar to the [FCC's] definition of 'enhanced

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[20] IP telephony services "enable real-time voice transmission using Internet protocols." *Report to Congress* ¶ 84.

services.' The Committee intends that the FCC would have the continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes.").

Congress's intent in the catch-all section 271(g) thus becomes plain: it sought preemptively to authorize services provided by a BOC or its affiliate that might arguably be thought of as telecommunications in some contexts—that is, "to clarify what might be doubtful." *Shook*, 132 F.3d at 782. But Congress could not have intended to alter the express definition of "interLATA service" by the complex and exceedingly indirect 271(g) route suggested by AT&T and others.

There is yet further evidence that this is the correct conclusion: In the entire Act, the term "interLATA service" is used only in sections 271, 272, 273, and 402 (authorizing judicial review of FCC orders granting or denying section 271 applications). If the definition does not control the meaning of the term in these provisions, it can never control the term's meaning. Under the opposing commenters' incoherent view, then, Congress enacted an express definition with absolutely no application in the statute. But Congress clearly did not intend for its express definition of "interLATA service" to be meaningless. Rather, it intended for the Commission to "follow that definition." *Stenberg v. Carhart*, 120 S. Ct. 2597, 2615 (2000).

CONCLUSION

The Commission must reconsider its erroneous ruling in the *Non-Accounting Safeguards Order* that interLATA information services are "interLATA services" within the meaning of section 271(a). To vindicate Congress's intent, as expressed in the statute's plain language, the Commission must confirm its holding in the *Report to Congress* and rule that a Bell operating company may provide information services, including interLATA information services, without thereby providing interLATA services in violation of section 271.

December 11, 2000

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CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of December 2000, I caused copies of the Joint Reply Comments of BellSouth, Qwest, SBC, and Verizon to be served upon the parties listed below by hand delivery.

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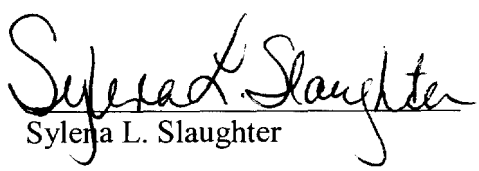

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